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POSSESSION AS EVIDENCE OF FRAUD.

There is much confusion among courts and law writers respecting possession in a grantor, vendor or mortgagor as evidence of fraud. Some judges, loosely, speak of it as being conclusive, and others as being only *prima facie* evidence of fraud, but a careful examination of this branch of the law will show that neither of the views so expressed is correct. In the present examination it will be sufficient to take up only the cases which have come before the Federal courts—courts which it is supposed and affirmed have taken the most extreme position of the two above alluded to. The argument deducible from these is applicable to all cases.

The first case to be considered is Hamilton v. Russell.[1] In that case the facts were substantially as follows: A bill of sale was made to a relation, of a slave, the vendor continuing in possession and appropriating the slave's earnings. The recording act of the State (Virginia) did not apply to bills of sale of personalty. Russell, a creditor of the vendor, levied under a *fi. fa.* on the slave and sold the same to satisfy his claim. The vendee sued Russell in trespass. The case was tried before a jury. The plaintiff asked for a misleading instruction,[2] which was refused by a divided court. The defendant asked for this instruction: "that if the slave, George, remained in possession of the vendor, by the consent and permission of the vendee; and if by such consent and permission the vendor continued to exercise acts of ownership over him, the vendee, under such circumstances, could not protect such slave from the execution of the defendant." The facts warranted this instruction and it was given. On appeal, the Supreme Court, relying on Edwards v. Harbin,[3] affirmed the decision in the court below. Marshall, C. J., delivered the opinion of the Supreme Court, and he, *inter alia*, said: "In some cases a sale of a chattel, unaccompanied by the delivery of possession, appears to have been considered as an evidence, or a badge, of fraud, to be submitted to the jury, under the direction of the court, and not as constituting in itself, in point of law, an actual fraud which rendered the transaction, as to creditors, entirely void. Modern decisions have taken this question up upon principle, and have determined that an unconditional sale where the possession does not 'accompany and follow the deed,' is, with respect to creditors, on the sound construction of the statute of Elizabeth, a fraud, and should be so determined by the court. The distinction they have taken is between a deed purporting on the face of it to be absolute, so that the separation of the possession from the title is incompatible with the deed itself; and a deed made upon condition which does not entitle the vendor to the immediate possession." He then considers the case of Edwards v. Harbin, where a bill of sale of sundry chattels had been offered to secure a debt, but was refused, unless at the expiration of fourteen days, if the debt should remain unpaid, the creditor was to have the privilege of taking possession of the goods and selling the same for the satisfaction of his debt. The surplus over the debt was to go to the debtor. All of which appears to have been assented to. An absolute bill of sale was made. Here was obviously a secret trust.[4]

The possession in both of these cases certainly constituted a strong circumstance as indicative of fraud. They were cases in which it would have been impolitic to have allowed the introduction of evidence of good faith which remained wholly a mental condition, not manifested by such acts as would explain the possession, and make the same appear consonant to what the law could sustain. In other words, the possession, under the circumstances, warranted a presumption of fraud, and the trial and appellate courts would probably have set aside any verdict which would have held otherwise. Doubtless, in principle, should any case similar to that of either of these arise, the trial court would be warranted in instructing the jury that the particular possession in that case was one

[1] 1 Cranch, 309.
[2] Compare R. R. Co. v. Houston, 95 U. S. 697.
[3] 2 Term Rep. 587.
[4] See Lukins v. Aird, 6 Wall. 78.

which the law condemned, irrespective of any actual intention of fraud.[5] The distinction between absolute and conditional deeds, which Chief Justice Marshall refers to, is subject to considerable modification in this country as we shall presently see, owing to the existence of registry acts in the United States. The absence of such acts colors extensively the law on this subject in England. But even there the positions herein combatted are not sustained. Had it been shown that the possession in the two cases just considered was accidental, fortuitous or forcibly and illegally obtained, and the other circumstances been consistent with that view, the instruction of the defendant in Hamilton v. Russell, would not have been given. All of which indicate that bald possession is not conclusive evidence of fraud. It is only a circumstance which goes in evidence with other circumstances; and according to the body of acts and facts proven, must be the action of the court in ruling upon the admissibility and inadmissibility of testimony and in giving instructions.[6] Respecting the expressions of Chief Justice Marshall in this case and the expressions of other judges hereafter considered, the remarks of Mr. Bishop seem to be applicable. "The bane of our law is, that when a great judge utters from the bench a pure and neatly cut legal truth as seen in the light of the facts in his contemplation, a small judge or a small law writer, coming after him, stops short of seeing the facts, and perversely bends the utterance to other facts which they do not fit. Thus is the actual truth of the law abused, cast down and trodden in the mire from age to age."[7]

In the case of United States v. Hooe,[8] upon the point that the deed was fraudulent against creditors, Marshall, C. J. said: "The statute contains a provision that it shall not extend to conveyances made upon good consideration and *bona fide*. The goodness of the consideration in the case at bar has been admitted; but it is alleged that the conveyance is not *bona fide*; and for this Twynne's Case has been principally relied on. But in that case the intent was believed by the court to be fraudulent, and in this case it is admitted not to have been fraudulent. It is contended that all the circumstances from which fraud was inferred in that case, are to be found in this; but the court can find between them no trait of similitude. In that case the deed was of all the property; was secret; was of chattels, and purported to be absolute, yet the vendor remained in possession of them, and exercised marks of ownership over them. In this case the deed is of part of the property, is of record, is of lands, and purports to be a conveyance which, according to its legal operation, leaves the property conveyed in possession of the grantor." The conveyance was held not fraudulent. Here there was possession continued in the vendor, but the admissible circumstances showed no fraud in the possession. A distinction seems properly to have been drawn between real estate and movable property. But these are only circumstances; for cases are conceivable where the continued possession of premises by a grantor, even after the recording of the deed, may be regarded as fraudulent.[9]

In *re* Brooks v. Marbury,[10] there was an assignment for the benefit of creditors. We quote from the opinion delivered by Marshall, C. J.: "It has been also contended by the plaintiff that if possession did not accompany and follow the deed, it is void as to creditors under the authority of the case of Hamilton v. Russell. On this point it may be proper to observe that in Hamilton v. Russell, the deed purported to convey the property to the vendee for his own immediate use, and the subsequent continued possession of the vendor was incompatible with the instrument. This is a deed of trust, not for the benefit of the person to whom it is made, but for the benefit of certain enumerated creditors. The continuance of the possession with the donor until the trust can be executed, may not be so incompatible with the deed as to render it absolutely void under all the circumstances. The court does not mean to express any opinion on this point farther than to say that it is not supposed to be decided in Hamilton v. Russell."

[5] Bevans v. U. S. 13 Wall. 57.
[6] Compare Brooks v. Marbury, 11 Wheat. 81, 82, quoted from *post*.
[7] Married Women, vol. 2, § 492.
[8] 3 Cranch, 88.
[9] See Lukins v. Aird, *ante*.
[10] 11 Wheat. 79.

In Conard v. Atlantic Insurance Company,[11] Judge Story delivered the opinion of the court, and, *inter alia*, said: "Without undertaking to suggest whether, in any case, the want of possession of the thing sold constitutes, *per se*, a *badge* of fraud, or is only *prima facie*, a presumption of fraud, a question upon which much diversity of judgment has been expressed, it is sufficient to say, that in case even of an absolute sale of personal property, the want of such possession is not presumptive of fraud, if possession can not from the circumstances of the property, be within the power of the parties." We have italicized the word '*badge*' because this qualifies the doctrine sometimes enunciated and so much relied on, that possession is conclusive evidence, or, as it is sometimes ambiguously expressed, evidence *per se*, of fraud. This language is, however, somewhat meaningless. What can be meant by 'badge of fraud, *per se*?' Does it mean the self-contradiction that 'badge of fraud' may be no 'badge of fraud,' or does it mean that a 'badge of fraud is conclusive, and excludes other evidence indicating no fraud? If the latter, then it is not a mere "badge" of fraud; if the former then there is no meaning in the language. The term, *per se*, is inapplicable in this connection; it conveys no other meaning than that a "badge of fraud" is "a badge of fraud"—something we suppose nobody would undertake to deny.

Robinson v. Elliott[12] was a case of a mortgage on a stock of goods, which was left in the possession of the mortgagor, who sold therefrom and took the proceeds; and contained a provision beneficial to the debtor and prejudicial to other creditors. The mortgage had been recorded. It was held void under the statutes of Indiana, and would, doubtless, have been held void according to the authorities relied on, at common law. The transaction was one calculated mostly to benefit the debtor, whatever the actual intention may have been, and so operated to hinder creditors in fraud of their rights. The case of Reed v. Minor[13] does not disclose the facts proven. It appears to have been tried before a jury. Instructions were asked for by plaintiff and defendant. It was a case of trespass for levying a *fi. fa.* upon the plaintiff's property for the debt of Silas and David Reed. The defense was a fraudulent conveyance of property by Silas and David Reed to the plaintiffs, E. and C. Reed. The head note contains the instructions given, and is in these words: "An absolute deed of all the household furniture, and all the stock in the shoe business, is fraudulent and void as to creditors, unless the possession *bona fide* accompany and follow the deed; but if the goods, at the date of the deed, were actually delivered to the grantees for a valuable consideration, and then taken possession of by one of the grantors, who was *bona fide* the known agent of the grantees, and who, as such, received and exercised exclusive possession *bona fide*, publicly and notoriously, for the sole use and benefit of the grantees, so that the change of possession was notorious and unequivocal, such possession was not inconsistent with the deed, and did not make it fraudulent and void, as to the creditors of the grantors. But if the possession remained with the grantors jointly, although the said agent was one of the grantors, such possession was inconsistent with the exclusive possession of such agent, and was not such a possession as gave effect to the deed, as a valid deed against the creditors of the grantors." Presumedly the instructions were applicable to the case. No objection appears showing that they were regarded as misleading or impertinent, and no appeal appears to have been taken. It is not going too far to say that possession under the circumstances contemplated in the defendant's view was fraudulent, *i. e.*, possession together with the other circumstances constituted the fraud. If possession under any and all circumstances was conclusive or even *prima facie* evidence of fraud, the instruction asked by the plaintiff would have been misleading. Moore v. Ringgold[14] is reported very briefly. That appears to have been replevin brought by Moore against Ringgold, who was marshal, for a horse, which had been taken under an execution against one Dunning, in whose possession it was found. The plaintiff claimed the property under a sale from Dunning, who tes-

[11] 1 Pet. 449.
[12] 22 Wall. 513.
[13] 3 Cranch, C. C. 82.
[14] 3 Cranch, C. C. 434.

tified that he sent the horse to Moore, with a bill of sale; that Moore sent him back to Dunning with the bill of sale, saying that as he had no other horse, he might keep him till he, Moore, should send for him. The court instructed the jury that according to the case of Hamilton v. Russell, unless possession accompanied a bill of sale it was a fraudulent transaction. Taking the ruling, the court, it may be presumed, also took the reasoning, in the case of Hamilton v. Russell. The case before it warranted a finding of fraud, because the return of the bill of sale indicated a sham transaction, and if it were not such, the transaction was of a kind which the policy of the law would condemn, as being of a nature irreconcilable with propriety or good faith. The court did not say, nor from any thing the case discloses, did it intend to say that possession of itself is conclusive evidence, no matter what the other circumstances, of fraud. That would have been inconsistent with what it had previously ruled in Reed v. Minor, and with what was ruled in Conard v. Atlantic Insurance Company.[15]

The case of Hamilton v. Franklin[16] is too meagerly reported to furnish much light respecting the facts which there existed. There appeared to be a continued possession of a slave after a sale by the party, until he again sold the same to a good faith purchaser. The bill of sale was recorded. There the possession, long continued, of a slave, and a sale thereof to a *bona fide* purchaser, were elements which doubtless weighed with the court, to hold, despite the fact of recording, that possession in the case was fraudulent. The language of the court in this case seems to warrant the position claimed, that possession is conclusive evidence of fraud, but as that is inconsistent with what the same court had previously ruled in Reed v. Minor, and with what was said in Brooks v. Marbury and Conard v. Atlantic Ins. Co., it would seem to be most reasonable to hold that the court had only reference to the case then before it. In any event that is the proper view to be taken, if the case is to have any weight as an authority. The remarks last offered also apply to the language of Story J., who delivered the opinion in Meeker v. Wilson.[17] There the learned judge expressed himself antagonistic to the view herein maintained, but without any proper consideration of the decisions on the question, and when the cause itself did not call for the expression. In perfect accord with the view herein advanced is the well-considered case of D'Wolf v. Harris,[18] in which Story, J., delivered the opinion. He said: "The general rule, upon transfers of personal property, is, that possession should accompany and follow the deed. But if, by the term of the contract itself, or by necessary implications, the parties agree, that the possession shall remain in the vendor, such possession is consistent with the deed, and does not avoid its operation in point of law, unless it be in fact fraudulent." In Phettiplace v. Sayles[19] Story J., distinguished between real and personal property, respecting the effect of possession, and said: "But possession, after a sale of real estate, does not *per se* raise a presumption of fraud." * * * * "Possession is not here deemed evidence of ownership. The laws of most civilized nations require solemn instruments to pass the title to real property; and in Rhode Island, as in most of the States of the Union, a deed executed with due formalities, and acknowledged before a magistrate, and recorded in the public registry, is indispensible to make a perfect transfer of real estate. The public look not so much to the possession as to the public records, as proofs of the title to such property. The possession, therefore, must be inconsistent with the sale, and repugnant to it in terms or operation, before it raises a just presumption of fraud." These remarks do not, however, furnish us with a full and accurate criterion. For, as fraud must be proved, and as the absence of a record often happens, where a deed or mortgage has been made and not recorded, and actual notice will bind subsequent purchasers, mortgagees and creditors, we can not, speaking accurately, say that absence of possession and of a record of the conveyance of either real or personal property are always presumptive or even evidence of fraud, for deeds are frequently made which are intended to and do, in equity,

[15] Travers v. Ramsey, 3 Id. 354, may be taken with the same qualifications as Moore v. Ringgold.
[16] 4 Cranch, C. C. 729.
[17] 1 Gallison, 419, 423.
[18] 4 Mason, 515, *et seq.*
[19] 4 Mason, C. C. 312, 322.

serve only as mortgages, and possession remains, until a given period understood between the parties, in the grantor, notwithstanding which the transaction is sustained, as being in perfect accord with good faith. In *re* Cantrell,[20] and *re* Manly[21] the courts took positions not inconsistent with the views herein advanced.

If the cases cited prove anything they prove this, that possession is not necessarily either conclusive or *prima facie* evidence of fraud.[22] To speak of possession as being in itself even *prima facie* evidence of fraud is misleading and improper. Mere possession will not prove fraud, even in respect of personal property; it may be evidence of ownership of personal property, but, as was remarked by Judge Story in Phettiplace v. Sayles, hardly of real estate. There must be accompanying circumstances attending the possession, or as it were coloring it. But possession is always open to explanation. The correct formulation of the law relating to the subject under discussion, in view of the authorities considered, and of all the authorities, when considered aright, is: Possession is a link in a chain of circumstances, pertinent in proving fraud, having greater or less weight according to the circumstances of each case. We are not now inquiring what testimony is admissible to explain possession; that is another question. There may be cases where possession and the surrounding circumstances may indicate a transaction so contrary to public policy that no further testimony of actual intent would be admitted; that, however, relates to the relevancy of testimony. So there may be cases where the evidence may indicate the possession to be a strong, and even unanswerable, circumstance, conclusively indicating fraud. Here, if the case is before a jury, it becomes the province of the court to instruct the jury, hypothetically, respecting the legal effect of such a possession, or, according to the view of some courts, to take the case from the jury by a peremptory instruction to find for a given side. Or, if the court tried the case, the court would apply the law to fit the circumstances of the given case. In short, whether a given transaction is fraudulent is a question of mixed law and fact, in which possession is a circumstance of more or less weight.

[20] 4 Ben. 482.
[21] 2 Bond, 261.
[22] See the remarks in Phettiplace v. Sayles, *ante*.

A MAN AND HIS NAME. II.

When a name has once been turned into a trade-mark, and a proprietary right acquired therein, this right in the name is capable of protection, even after it has passed away from the person to whom it originally belonged. Thus within the last few weeks the Court of Appeal decided in Massam v. Thorley s Cattle Food Company, 10 Cent. L. J. 211, that the executors of the originator of "Thorley's Cattle Food" were entitled to restrain the use of the name by a company formed for the purpose of manufacturing a similar article, thus practically overruling James v. James, 20 W. R. 434, L. R. 13 Eq. 421. And the same is the case when what has happened is, not the death of the proprietor, but an assignment of the business, carrying with it the right to use the trade-marks, in which a trade-mark consisting of a name, but which has ceased to possess a personal significance, would be included. "A name, though originally the name of the first maker, may, in time, become a mere trade-mark or sign of quality, and cease to denote, or to be current as indicating, that any particular person is the maker. In many cases a name once affixed to a manufactured article continues to be used for generations after the death of the individual who first affixed it. In such cases the name is accepted in the market either as a brand of quality, or it becomes the denomination of the commodity itself, and is no longer a representation that the article is the manufacture of any particular person." Per Lord Westbury in Hall v. Barrows, 12 W. R. 322, 4 DeG. J. & S. 150; Leather Cloth Company v. American Leather Cloth Company, 12 W. R. 289, 4 DeG. J. & S. 144. But it must not be forgotten that the assignability of a name trade-mark entirely depends upon the personal element having been wholly eliminated. Leather Cloth Company's Case, *supra*, and also in House of Lords, 13 W. R. 873, 11 H. L. C. 523; Bury v. Bedford, 12 W. R. 726, 4 De G. J. & S. 352. Thus, when the founder of a theatre, which he had called after his own name, "Booth's Theatre," and which he had described by that name in various mortgages of the premises, sought to restrain the assignees of the lease of the premises from continuing to call the theatre by that name, the injunction was refused, on the ground that the name had become the name of the establishment, and had ceased to imply any personal interference of the plaintiff. Booth v. Jarrett, 52 How. Pr. 169.

This question of the assignability of name trade-marks and of trade-names—which, since the decision of the House of Lords in Singer Manufacturing Company v. Wilson, 26 W. R. 664, L. R. 3 App. Cas. 376. (see 3 Cent. L. J. 706), must be

taken to be pretty much the same thing—has most frequently come up in cases of disputes between persons who have, at some time or other, filled the position of co-partners. Both in England and in America the extent to which a purchaser of a business, or a partner who has acquired his partner's share in the business they have carried on together, acquires with the business or share in the business the right to continue to use, by way of trade-name or trade-mark, the name of the person from whom he has acquired the business or share therein, has been the subject of considerable difference of opinion. By some judges it has been thought that no right in the name passed with the good will (Peterson v. Humphrey, 4 Abb. Pr. 394; Howe v. Searing, 10 Id. 264; Scott v. Rowland, 20 W. R. 508); and in one American case (Reeves v. Denicke, 12 Abb. Pr. N. S. 92), the judge even went so far as to decide that a person who had bought out a partner named E. H. Reeves was not entitled to describe his new firm as successor to the old one, thus: "Robert C. Reeves, successor to E. H. Reeves & Co." No other case, however, goes nearly as far as this; and on the whole, the authorities in favor of the right of continuing to use the name appear considerably to preponderate. In Churton v. Douglas, 7 W. R. 365, Lord Hatherly pointed out most clearly the importance of the trade-name as an element of the good-will, and long before this time Lord Thurlow had held that surviving partners could not be restrained from continuing to use the name of their deceased partner in their business, at all events unless his estate would be thereby involved in some liability. Webster v. Webster, 3 Swanst. 490. In Banks v. Gibson, 13 W. R. 1012, 34 Beav. 566, where the plaintiff was the widow of one of the partners in Banks & Co., and the defendant was the surviving partner, Lord Romilly held that as the partnership had been simply dissolved, and neither partner had bought the other out, each could use the old firm name. He said, "The name or style of the firm of 'Banks & Co.' in which the defendant had been engaged for a period of fourteen years, was an asset of the partnership, and if the whole concern and the good will of a business have been sold, the name, as a trade-mark, would have been sold with it. If by arrangement one partner takes the whole concern, there must be a valuation of the whole, including the name or style of the firm. But if the partners merely divide the other partnership assets, then each is at liberty to use the name just as they did before. It is the same as if two persons who alone carried on the business of 'Child & Co.,' thought fit to separate, each would be entitled to use the name by which they carried on their business." Then, again, in McGowan Bros. Pump Machine Company v. McGowan, 2 Cin. 313, it was said in the Superior Court of Cincinnati that "there can be no doubt that where one partner sells to another partner a going business, every advantage arising from the fact of the sole ownership of the premises, stock and establishment, including advantages acquired by the old firm in carrying on its business, whether connected with the old place or the old name, passes to the purchaser." Lastly, in Levy v. Walker, already cited, it was held that one of two partners who had bought the other partner's interest in the business, was entitled to use the old firm name, in which the names of both partners appeared, and Lord Justice James said distinctly: "I hold that the sale of the goodwill and business did convey the right to the use of the partnership name as a description of the articles sold in that trade, and that that right is an exclusive right as against the person who sold it, and as against all the world, if any person in that world were representing himself as carrying on the same business." Where the purchase has been from a trustee in bankruptcy, it has been held in the Supreme Court of New York (Helmbold v. Helmbold Manufacturing Company, 53 How. Pr. 453) that there is a difference, and that the bankrupt could not be deprived of the right to use his name, though he might have been if the purchase had been from himself; but in Bury v. Bedford no such distinction was recognized.

Of course, when a man has given another a contract right to use his name, he is not entitled to complain if the latter exercises his privilege, as in Ward v. Beeton, 23 W. R. 533, L. R. 9 Eq. 207, where an annual, in which Beeton had had no hand, was allowed to be published under the name of *Beeton's Christmas Annual;* and where the proprietor of a trade-name or trade-mark goes into partnership with some one else, he carries the trade-name or trade-mark into the partnership with him, as in Conby v. Mitchell, 26 W. R. 269.

It is not with business pursuits in the ordinary sense exclusively that the name claimed must have been connected. In Lord Byron v. Johnston, 2 Mer. 29, the name protected was the name of a poet; in Archbold v. Sweet, 1 M. & Rob. 162, it was the name of an author of legal works; in Christy v. Murphy, 12 How. Pr. 77, and Montague v. Moore, Wood, V. C. March 1, 1865, it was the name of the organizer of a troupe of Ethiopian minstrels. Nor does it make any difference whether the name is a genuine or an assumed one. In Isaacson v. Thompson, 20 W. R. 196, the plaintiff, a milliner, was carrying on business as "Madame Louise;" in Clemens v. Such, N. Y. Supreme Court, July 11, 1873, the plaintiff had written humorous books under the *nom de plume* of "Mark Twain." But whether the name be real or fictitious, the use by the defendant must be such as to be calculated to deceive, so that, where no deception is to be anticipated, no relief will be granted, as in the case of "Claribel's" songs, Barnard v. Pillow, W. N. 1868, p. 94. In Gouraud v. Trust. 10 N. Y. (S. C.) 627, the plaintiff had changed his name from Trust to Gouraud, under which name he sold "Gouraud's Oriental Cream," and the defendants, who were restrained by injunction, were his sons, who had retained their original name, but had begun to sell a preparation as "Creme Orientale, by Dr. T. F. Gouraud's Sons." And in such cases as the above the fraudulent use of another's name is criminally punishable, either on a prosecution for false pre-

tences or on one for a cheat at common law; but such an offense is not forgery, as was decided in the case of the name of the painter Linnell. R. v. Closs, D. & B. 460.

Even apart from a trade or business, a person whose name has without authority been injuriously used by another is entitled to an injunction, as in Routh v. Webster, 10 Beav. 561; and, even though what the defendant has done amounts to a libel, it seems that, if he does not exercise his right of claiming a jury at the proper time, but allows that opportunity to slip, he will not be allowed afterwards to contend successfully that the court has no jurisdiction under the Judicature Acts to grant an injunction to restrain a libel without the verdict of a jury. Massam v. Thorley's Cattle Food Company, *supra*; Thomas v. Williams, *supra*. In Reid v. Sibbald, 18 Journ. of Jurisp. 392, the Scotch court granted an interdict to restrain a name intended to represent the name of a sheriff's officer from being used in such a manner as to bring discredit and ridicule upon the latter, who would thus be injured in his position in life; and it seems, from the decisions referred to, that in a similar case the English court would now sit as a jury and grant an injunction at the hearing of the action, unless the defendant claimed a jury at the proper time and in the proper manner indicated by the acts and rules governing the practice of the court.

ACTION—PRIVITY OF CONTRACT NECESSARY TO SUPPORT.

DAVIS v. CLINTON WATER WORKS CO.

Supreme Court of Iowa, June, 1880.

A entered into a contract with the City of C to supply water to be used by the city in extinguishing fires. Through the neglect of A in supplying sufficient water, the property of B, in said city, was entirely destroyed by fire. *Held*, that B had no right of action against A.

Appeal from Clinton Circuit Court.

Action at law to recover the value of certain buildings destroyed by fire, upon the ground that defendant was bound by contract with the City of Clinton to supply water to be used in extinguishing fires, and failed to perform its obligation in this respect, which resulted in the destruction of plaintiff's property. A demurrer to the petition was overruled, and defendant appeals from the decision upon the demurrer.

E. S. Bailey and *Wright, Gatch & Wright*, for appellant. *J. S. Darling* and *A. R. Cotton*, for appellee.

BECK, J. delivered the opinion of the court:

The petition alleges that the defendant entered into a contract with the City of Clinton to supply water to be used by the city for the purpose of extinguishing fires. The contract is embodied in an ordinance passed by the city authorizing defendant to establish its works for supplying water to the city, and providing for compensation to be paid defendant by the city for water furnished for public purposes, including the extinguishing of fires. The terms and conditions of this contract need not be recited. It is sufficient to state that the parties thereto were the city and the defendant, and the plaintiff in this case in no sense was a party to the contract. The power of the city to pass the ordinance and enter into the contract is not questioned. The petition alleges that a fire occurred in certain store-rooms owned by plaintiff in the city, and they were entirely consumed, for the reason that the necessary supply of water was not furnished by defendant, and a sufficient pressure of water was not found at the hydrants contiguous to the buildings, which was caused by defective machinery and the negligence of defendant's servants, all of which was in violation of defendant's contract under said ordinance of the city. A demurrer to the petition was overruled.

The only question presented in the case is this one: Is the defendant liable to plaintiff upon the contract embodied in the ordinance? The petition does not allege or show any privity of contract between plaintiff and defendant. The plaintiff is a stranger, and the mere fact that she may find benefits therefrom, by the protection of her property, in common with all other persons whose property is similarly situated, does not make her a party to the contract or create a privity between her and defendant. It is a rule of law, familiar to the profession, that a privity of contract must exist between the parties to an action upon a contract. One whom the law regards as a stranger to the contract can not maintain an action thereon. The rule is founded upon the plainest reasons. The contracting parties control all interests, and are entitled to all rights secured by the contract. If mere strangers may enforce the contract by actions, on the ground of benefits flowing therefrom to them, there would be no certain limit to the number and character of actions which would be brought thereon. Exceptions to this rule exist, which must not be regarded as abrogating the rule itself. Thus, if one, under a contract, received goods or property to which another, not a party to the contract, is entitled, he may maintain an action therefor. So, the sole beneficiary of a contract may maintain an action to recover property or money to which he is entitled thereunder. In these cases the law implies a promise on the part of the one holding the money or property to account therefor to the beneficiary. Other exceptions to the rule, resting upon similar principles, may exist. See National Bank v. Grand Lodge, 98 U. S. 123, 8 Cent. L. J. 71.

The case before us is not an exception to the rule we have stated. The city, in exercise of its lawful authority to protect the property of the people, may cause water to be supplied for extinguishing fires and for other objects demanded by the wants of the people. In the exercise of this authority it contracts with defendant to supply the water demanded for these purposes. The plaintiff received benefits from the water thus supplied in common with all the people of the city. These benefits she receives just as she does

other benefits from the municipal government, as benefits enjoyed on account of improved streets, peace and order enforced by police regulations, and the like. It can not be claimed that the agents or officers of the city employed by the municipal government to supply water, improve the streets, or maintain good order, are liable to a citizen for loss or damages sustained by reason of the failure to perform their duties and obligations in this respect. They are employed by the city, and responsible alone to the city. The people must trust to the municipal government to enforce the discharge of duties and obligations by the officers and agents of that government. They can not hold such officers and agents liable upon the contracts between them and the city. These views and conclusions are supported by the following authorities: Atkinson v. Newcastle etc. Water Co., L. R. 2 Ex. Div. 441; Nickerson v. Bridgeport Hydraulic Co., 46 Conn. 24; Vrooman v. Turner, 69 N. Y. 280; Wharton on Negligence, §§ 438, 439, 440; Shearman and Redfield on Negligence, § 54. The cases cited by counsel for plaintiff, we think, are not in conflict with the view we have above expressed.

Counsel for defendant base an argument upon the position that the city itself would not be liable to defendant in case it owned and operated the water-works. They argue that the defendant, therefore, would not be liable to plaintiff. We find it unnecessary to consider the argument, or the premise upon which it is based. We are content to rest our conclusion upon the grounds and arguments we have attempted to present.

The circuit court erred in overruling the demurrer to plaintiff's petition. Its judgment is, therefore, reversed.

CONTRACT FOR FANCY SIGNS—DISCRETION GIVEN TO DESIGNER.

THOUBBORON v. LEWIS.

Supreme Court of Michigan, June, 1880.

A, a baker in Detroit, ordered of B, an ornamental sign painter in New York, a quantity of show cards. The contract was entered into by correspondence, and in one of his letters A enclosed a sketch of what he wanted, which among other things contained a shield with the word "established" on one side of it and the figures "1875" on the other. The letter stated that A wanted "something of this style," referring to the sketch, and concluded by saying, "Give us a clean, neat label." The cards were completed and forwarded to A, who refused to receive them, for the reason that the word "established" and the figures "1875" were placed at the top instead of in the position indicated by the sketch. *Held*, that the contract gave B a discretion as to the artistic arrangement of the figures, and that A's refusal to accept could not be sustained.

Error to Detroit.

James O'Brien and *John Atkinson*, for plaintiff in error; *H. A. Harmon* and *H. A. Chaney*, for defendants in error.

GRAVES, J., delivered the opinion of the court:

The defendants, who are bakers in Detroit, refused to accept and pay for a quantity of fancy signs made for them by the plaintiff, an ornamental sign painter in New York. The negotiation between the parties was carried on by correspondence. The defendants, under date of April 12, 1879, wrote for samples of show cards about the size and style of Hathaway & Son's "Gloss Polish" card, with black ground and red letters, leaving out the picture and putting in "plain, bold letters." The plaintiff replied under date of the 14th, and enclosed a sample of signs just made for a coffee-house, and observed that he could design for defendant's trade, and finish up in the style of the coffee-house sign, at certain rates specified.

The defendants, under date of the 17th, sent a rough plan which they desired the plaintiff to *sketch* for them and return as soon as possible, when, as was added, "we will send you order for same," and the plaintiff thereupon drew a pencil sketch and sent it on the 21st. On receipt of this the defendants wrote, on the 28th, "Enclosed we return you sketch for label with the words 'Established 1875' added," and on inspecting the sketch the word "established" appeared in written characters on one side of the shield and figures "1875" on the other. The communication proceeded as follows: "We would like to have our name and crackers a little more prominent; that is, have the letters shaded, so that they will stand out bold and distinct, viz. (giving a pen and ink illustration of the style of letter meant), or something of that style. Please advise us when we may expect them. Give us a clean, neat label."

The plaintiff replied May 1st that he would make the alteration required and get the signs out without delay, and suggested that it would take about two weeks. A week later the defendants wrote that they had been told that some show signs faded soon, and they desired him to use a color which would not fade by exposure to the sun, and nearly a week thereafter they wrote again that a person whom they named was then at work on a show card for certain establishments which were competitors of defendants, and they observed: "We want something that will beat theirs. C. (the person getting up the other card) said yours would all fade out in a short time." The plaintiff, five days later, forwarded from New York to defendants 1,013 of the signs, and on their arrival at Detroit the defendants refused to accept them, and among the grounds of their refusal the most material was that the word "established" and the figures "1875" were placed at the top instead of being put in the positions where they were noted on the sketch by defendants. The plaintiff then brought this action for the price, and the jury, under a charge which in substance required them to find for defendants, unless, in their judgment, the defendants left the placing of the new matter before mentioned to the plaintiff's discretion, returned their verdict in the defendants' favor.

The essential question is whether the learned judge, in leaving this point to the jury, and they

in deciding it as they did, committed an error, and on full consideration, we think they did. That the place assigned to the added word and figures by the plaintiff was in better taste than the original, and that the card so shaped stood a better chance than it would have done otherwise to "beat" the signs preparing for the other bakers, has not been disputed. The word "established" containing eleven letters, and the date of the year only four figures, the appearance of the long word on one side of the shield, and the short date on the other, would involve irregularity and breach of harmony, and would cause more or less offense to the eye. But defendants contend, as they did below, that the agreement was fixed and absolute in requiring the added matter to be set down exactly where they had noted it on the sketch, and that artistic ideas were not admissible to overrule the stipulation; that they were entitled to have their own way, and to stand on strict compliance with the bargain, whether the production would be more or less pleasing to artists and amateurs.

The right of the defendants to insist upon substantial observance of the contract in every particular is, of course, not disputed. But the question is, by whom and how shall the contract be interpreted? As it depended on written and not oral materials, and they called for no expository aid beyond a consideration of the interior and surrounding circumstances, it was for the court, and not for the jury, to decide whether the plaintiff was authorized to fix the position of the word and figures in question.

And it only remains to speak of the interpretation called for. The negotiations being by letter and between business men, and not being conducted in the phraseology of lawyers, or with the care about expression generally observed in formal documents, it is not safe and would not be fair to test it by any technical rules. It is a case for equitable interpretation, and the proper course is to look at all the circumstances, and then read the arrangement as the defendants were bound to consider it as understood by the plaintiff, Mizner v. Kussell, 29 Mich. 229–231; Potter v. Ontario, etc. Ins. Co., 5 Hill, 147; Barlow v. Scott. 24 N. Y. 40; Hoffman v. Ætna Ins. Co., 32 N. Y. 405; Gunnison v. Bancroft, 11 Vt. 493; 3 Kent's Com. 557; White v. Hoyt, 73 N. Y. 505.

He was a skilled designer and printer of fancy signs, and the defendants sought his service because he was so, and because they were not artists in that line. They believed he had special qualifications, not only for executing, but also for designing, and they felt that to attain their object it would be expedient to confide much to his taste and judgment. Whilst they might indicate the ends they sought, it would be requisite to leave to his decision in a considerable degree the final choice of the proper means. They wanted something superior to their neighbors, and it was expected of him to draw upon his ability to satisfy them. In referring to the lettering they explained that they desired to have the letters shaded so they would stand out bold and distinct, but instead of confining him to any precise method they told him they wished "something" of the style of the pen and ink illustration, and concluded by saying, "give us a clean, neat label." By this they required his judgment of what would be "clean and neat," and impliedly excluded his employment of anything or any arrangement which, in *his* views, would be unseemingly and out of proportion. Again, they requested that he would use durable colors, and so inferentially referred the selection in that regard to his judgment. And, finally, they desired that he would provide a card that would "*beat*" the signs their neighbors were getting up.

Now these various observations and deviations, when viewed, as it was natural they should be, in the light of all the facts, were obviously and directly calculated to impress him with the notion that he was allowed discretion wherever he was not positively instructed, and that he was not expected to display the added matter in any predetermined position, or in any way which, according to his judgment, would mar the effect and constitute a blemish. The whole grouping had been left substantially to await his suggestions, and the interference of the defendants had been confined to ideas of style. When they received the sketch, they were careful to point out certain changes in the letters to be employed, and to specify certain effects they desired to have produced, but were silent as to the position the new matter should occupy. The only thing which might have indicated that they preferred any special position for it was the fact of its being noted on the sketch as before mentioned. But the other circumstances were too expressive of the purpose that the plaintiff should use his own judgment, to leave any room to claim that he understood, or was bound to understand, from the fact referred to, that the new matter was required to be pointed out where it was noted.

Considering the situation of the parties relative to each other, and what they were negotiating about, and in what manner, the conclusion is just that it was incumbent on the defendants to make known distinctly to the plaintiff that the word and figures in question must be inserted where they were noted, if it was meant to hold him to a literal adherence in that respect to the sketch. They did not do so, but gave their correspondence such shape as to authorize him to infer that he was to make a change, if neatness, in his judgment required it.

On the whole, the jury ought to have been instructed that the placing of the word "established," and the accompanying figures, "1875," was left to the reasonable discretion of the plaintiff.

The judgment must be reversed, with costs, and a new trial ordered. The other justices concurred.

CARRIERS OF PASSENGERS — REGULATIONS—CONTRIBUTORY NEGLIGENCE.

PENNSYLVANIA R. CO. v. LANGDON.

Supreme Court of Pennsylvania, March, 1880.

1. The right of a railroad company to make reasonable rules for its own protection, and for the safety and convenience of passengers, has been repeatedly recognized.

2. A passenger who voluntarily leaves his proper place in the passenger car, in violation of a known rule of the company, to ride in the baggage car or other known place of danger, and who is injured in consequence of such violation, can not recover damages for such injury.

3. Where the rule violated is one having regard exclusively to the safety of passengers, it seems that damages can not be recovered for an injury resulting from such violation, even though the negligence of the company's servants was the cause of the collision or other accident by which the injury was occasioned.

4. A conductor can not, in violation of a known rule of the company, license a man to occupy a place of danger so as to make the company responsible.

Error to the Common Pleas of Allegheny County.

PAXSON, J., delivered the opinion of the court:

There are certain facts in this case which are not disputed. Stephen Langdon, the deceased, to recover damages for whose death this action was brought, was an employee of the company defendant, but was not engaged upon the Western Pennsylvania Railroad, where the accident occurred. His position was that of night inspector of locomotives at the outer depot of the Pennsylvania Railroad in the City of Pittsburg. The depot had been burned by the rioters the day before the accident occurred. He lived upon the line of the Western Pennsylvania Railroad, a few miles out of the city, and was in the habit of riding to and from his home, daily, on said road. He traveled upon a commutation ticket, such as is usually sold to passengers. At the time of the accident he was riding in the baggage car, in violation of the rules of the company. Said rules were conspicuously posted in the baggage car. The particular rule in question is as follows: "They (the trainmen) must see that passengers are properly seated, and will not allow them to stand on the platforms of tne cars, nor ride in the baggage or mail cars. Conductors and brakemen are instructed to strictly enforce this rule, and it is expected that passengers will cheerfully comply, as the rule is one intended for their own safety, it being particularly dangerous for passengers to be on platforms as trains approach stations." Whilst Langdon was sitting in the baggage car, and after the train had left Sharpsburg, it collided with the mail train, injuring him so severely that his death occurred within a few hours thereafter. Had he been in the smoking car or in any of the passenger cars, he would not have been injured. After the accident he stated to some of the witnesses that if he had not gone into the baggage car he would not have been hurt.

The right of a railroad company to make reasonable rules for its own protection, and for the safety and convenience of passengers, has been repeatedly recognized. Sullivan v. Philadelphia etc. R. Co., 30 Pa. St. 234; Power v. Pennsylvania R. Co., 32 Id. 414; West Chester etc. R. Co. v. Miles, 55 Id. 209; Pittsburg etc. R. Co. v. McClurg, 56 Id. 204; Central R. Co. v. Green, 86 Id. 421; O'Donnell v. Allegheny Valley R. Co., 59 Id. 239. Such companies are held, and very properly, to a strict measure of responsibility in cases of injuries to passengers. It is not unreasonable that they should have the right to require passengers to observe such proper regulations as are essential to their own safety. With all the care such corporations can exercise in the perfection of their road bed and machinery, and in the selection of their servants, accidents involving injuries and loss of life will frequently occur. This must continue to be the case so long as iron and wood are destructible, and dependence is placed upon the fidelity, the vigilance and the judgment of servants. A misplaced switch, or an inaccurately worded telegram, may send a train to destruction. In such and other like cases, the company is liable to the party injured. The practicable impossibility of avoiding all accidents by rail, furnishes no good reason why such corporations shall not respond in damages for injuries caused by the negligence of their servants when and so often as the same occurs. Such being the measure of their responsibility, may they protect themselves so far as to require passengers to conform to reasonable rules intended to lessen the chances of their being injured? We know of no well considered case which holds that they may not do so, nor has any sufficient reason been shown why they should not. In doing so they at least seek to guard the lives of their passengers.

The baggage car is a known place of danger. In this respect it differs from the cow-catcher and the platform only in degree. It is placed ahead of the passenger cars, and next to or near the locomotive. In cases of collision it is the first car to give way to the shock, and frequently is the only one seriously injured. It is treated as dangerous by the rules of all well regulated companies, and the rule of the defendant company emphatically declared it to be so. An infant or an idiot might be excused for riding in such a position by reason of his lack of mental capacity, but an intelligent man, accustomed to railroad travel, must be presumed to know its danger. It is patent and the same under all circumstances.

Can a passenger who voluntarily leaves his proper place in the passenger car, in violation of the rules of the company, to ride in the baggage car, or other known place of danger, and who is injured in consequence of such violation, recover damages for such injury? We are not speaking of a possible accident the result of a brief visit to the baggage car to give some needed directions about a passenger's baggage, to have it re-checked or for any other legitimate purpose, but of a person who rides in a baggage car in violation of a known rule of the company and who is injured in consequence of such violation.

In considering this question regard must be had to the character of the rule violated. The rules adopted by the railroad companies are a part of their police arrangements. Some of them are for the convenience of the company in the arrangement of its business, others are for the comfort of passengers, and yet others have regard exclusively to the safety of passengers. The distinction between them, and the difference in the consequences of their violation, is manifest. As an illustration: It would be unreasonable to hold that the violation of the rule against smoking could be set up as a defence to an action for personal injuries resulting from the negligence of the company. On the other hand, should a passenger insist upon riding upon the cow-catcher in the face of a rule prohibiting it, and as a consequence should be injured, I apprehend it would be a good defense to an action against the company, even though the negligence of the latter's servants was the cause of the collision or other accident by which the injury was occasioned. And if the passenger thus recklessly exposing his life to possible accidents were a sane man, more especially if he were a railroad man, it is difficult to see how the knowledge or even the assent of the conductor to his occupying such a position could affect the case. There can be no license to commit suicide. It is true the conductor has the control of the train, and may assign passengers their seats. But he may not assign a passenger to a seat on the cow-catcher, a position on the platform or in the baggage car. This is known to every intelligent man, and appears upon the face of the rule itself. He is expressly required to enforce it, and to prohibit any of the acts referred to, unless it be riding upon the cow-catcher, which is so manifestly dangerous and improper that it has not been deemed necessary to prohibit it. We are unable to see how a conductor, in violation of a known rule of the company, can license a man to occupy a place of danger so as to make the company responsible. It is otherwise as to rules which are intended merely for the convenience of the company or its passengers. It was said by Woodward, J., in Sullivan v. Railroad Co., 30 Pa. St. 234, that "on the part of the passenger his assent is implied to all the company's reasonable rules and regulations for entering, occupying and leaving their cars, and if injury befall him by reason of his disregard of regulations which are necessary to the conduct of the business of the company, the company are not liable in damages even though the negligence of their servants concurred with his own negligence in causing the mischief." This principle is even broader than the one we are now contending for. We only assert here, that if a passenger wilfully violates a known rule intended for his safety, and is injured in consequence of such violation, he is not entitled to recover damages for such injury.

We are not aware that the foregoing views conflict with any of our own cases. They may not harmonize with some of the *dicta* which lie scattered through them, but a careful examination of the points decided shows no serious embarrassment. In O'Donnell v. Allegheny Valley R. Co., 59 Pa. St. 239, one of the cases relied upon to sustain the contrary view, the court below instructed the jury, as we gather from the opinion of Agnew, J.: "Summing up the doctrine of the court, as found in the charge and answers to the points, it was this: That the baggage car is an improper place for a passenger, and whether the rule of the company forbidding him to be there is made known to him or not, his own intelligence should teach him that it is not his proper place — that if he leave his seat in the passenger car and goes into the baggage car he is guilty of negligence. That nothing less than a direction or an invitation from the conductor to go there will excuse this negligence, and such direction or invitation should not be inferred from the mere fact that he had been accustomed to ride frequently in the baggage car with the knowledge of the conductor and without objection. The judge, therefore, instructed the jury that if the plaintiff left the passenger car without the direction or invitation of the conductor, he did what no passenger had a right to do, even though he had been accustomed to ride there with the knowledge of the conductor and without his objection." It will be noticed that this court did not deny the correctness of this ruling as an abstract proposition. It was merely held that it was not correct as applied to the facts of that case. It was said by the court: " In view of the evidence this instruction was erroneous." What was the evidence? Again I quote from the opinion: " The plaintiff had been riding in the baggage car twice a day for about two months. Murphy, the conductor, himself admitted that Liston's men rode frequently in the baggage car without his objection; that he never ordered them out. When they got on that car, they generally remained there without objection; that he had no recollection of requesting them to go into the passenger car, and that he had not at any time requested the plaintiff to leave the baggage car. The reason for this is obvious. These hands, though passengers on the train from the terms of their employment, still retained the outward appearance of employees. They were in their working clothes, which, owing to their employment, were doubtless often soiled and filled with perspiration. They were probably at times not considered travelling companions for those who sat in the passenger cars, and at times the cars were probably filled. It was not at all unnatural that they themselves would wish, and that the conductor should desire them to travel on the baggage car, out of the immediate presence of the passengers. Under the circumstances it cannot be justly said of them, as of ordinary passengers, 'that any one who is possessed of sufficient intelligence to travel should be held to know that the baggage car is not an appropriate place for passengers,' nor to say, although the consent of the conductor to riding there may be inferred from these facts, yet it does not follow that the company is liable unless it is shown that they were there at the invitation or by direction of the conductor." And in concluding his opinion, the

learned judge said: "From the evidence in this case the jury might reasonably conclude that O'Donnell was in the baggage car with the permission of the conductor and for the benefit of the company, and was rightfully there at the time of the accident." It will be observed that the case was put mainly upon the ground that the plaintiff and his co-employees had been riding in the baggage car daily for two months, under circumstances which would justify the jury in finding that it was an arrangement for the benefit of the company. It may be conceded that if a baggage car is used as a passenger car for months, the full measure of responsibility would attach. There is nothing of the kind here. The deceased was riding in the baggage car for his own convenience, and to have a chat with the baggage-master, with whom he appears to have been intimate. The assent or even the knowledge of the conductor was not shown. The jury were allowed to guess at it, by reason of the submission of this question of fact upon clearly insufficient evidence. In Lackawanna etc. R. Co. v. Chenewith, 52 Pa. St. 382, there was a violation of a rule of the company, but it was a rule that had no relation to the plaintiff's safety as a passenger. He induced some of the company's employees, in the absence of the superintendent, to attach his freight car to a passenger train, agreeing to run all risks and to attend to the brakes on his own car. The engine ran over a cow, by means of which the plaintiff was injured. It is manifest the facts of this case have no analogy to that of a passenger who leaves his seat in the cars and rides in a known place of danger in violation of the company's rules. The court evidently held this view, for it was said by Mr. Justice Thompson, in delivering the opinion: "If a passenger puts himself out of place and in a place of danger, and is injured as the result, this is *damnum absque injuria*, and he cannot recover." The recent case of Creed v. Pennsylvania R. Co, 86 Pa. St. 139, also rests upon an entirely different state of facts. There the deceased was r'ding in the caboose car at the rear end of the train, in violation of the rules of the company. But it nowhere appeared that the rule violated was intended for the safety of passengers, nor was it even alleged that the caboose car was a place of danger. On the other hand, it was said by Mr. Justice Gordon: "No presumption of negligence can arise, either in fact or in law, from the fact of Creed's occupancy of the caboose, for there is no evidence that it was in any degree more unsafe than any other car in the train. It was, indeed, under all ordinary circumstances, the one that was the most safe; from collisions in front of the train, it was protected by the cars which preceded it, and from dangers behind, being itself a lookout, it was guarded by the constant vigilance of the employees." The distinction between this case and the one in hand is so palpable, that further reference to it is unnecessary.

Our own cases give us no trouble, nor is there serious difficulty in the authorities outside of this State that have been called to our attention. In Dunn v. Grand Trunk R. Co., 58 Me. 187, the plaintiff got on board a freight train in violation of the rules of the company. The conductor did not put him off, nor request him to leave, but accepted his fare as a first-class passenger. It was held that he was entitled to recover for injuries caused by the negligence of the company's servants. Here the conductor accepted his fare as a first-class passenger, and permitted him to take his seat in the saloon-car of the freight train. There was no point that it was a place of danger, nor that the rule was intended for the safety of passengers. On the contrary, it was manifestly a mere police regulation in the interests of the company. It was said by Appleton, C. J., in delivering the opinion of the court: "If any extraordinary danger arises from the violation of the known rules of the company, as by standing on the cars when in motion, the passenger violating the rules assumes the special risks resulting from such violation. But if the act of the passenger in no way conduces to the injury received, the carrier must be held responsible for the necessary consequences of his negligence or want of care." Isbell v. New York etc. R. Co., 27 Conn. 393, was an action brought to recover damages for cattle killed upon the track, and has no application. Keith v. Pinkham, 43 Me. 501, was a case of injury to a passenger by stage. He took a seat on the outside of the coach —there being a vacant seat inside—after being told, that if he did so, it would be at his own risk. The defendant asked an instruction, that if plaintiff had been directed to take an inside seat, he could not recover. Appleton, J., said: "If the plaintiff was injured through his or their neglect, he being in the exercise of ordinary and common care in no way contributing to the injury by his position, he might well maintain this suit. The fact that the plaintiff took his position outside was a circumstance proper for the consideration of the jury in determining whether his negligence contributed in any way to the production of the injury. But the requested instructions took from the jury all inquiries as to the defendant's negligence, and they were rightfully withheld." Here the plaintiff took a seat intended for passengers, and usually so occupied. If it was a place of danger, such fact did not appear, and it may be safely said, as a general rule, the result of every intelligent man's experience, that an outside seat on a stage coach can not be pronounced extra hazardous as a matter of law. It was properly left to the jury. Huelsenkamp v. Citizen's Railway Co., 37 Mo. 537, was an injury to a passenger whilst standing on the platform of a city car. No notice was given not to ride there, nor was any rule of the company shown. The question, whether it was a position of danger was not raised, and there is little analogy in this respect between a horse car in a city and a car propelled by steam. Richmond v. Sacramento Valley R. Co., 18 Cal. 351, was a case of a passenger who was injured by an accident caused by cattle upon the track. It is not in point. In Washburn v. Nashville, etc. R. Co., 3 Head, 638, the plaintiff was injured whilst riding in the bag-

gage car. In this respect it resembles the case under consideration. But here the analogy ceases. The plaintiff was traveling upon a pass, and the principal question was whether he could recover for that reason. This question was settled by Railroad Co. v. Derby, 11 How. 468. No point was made in regard to a rule of the company prohibiting the use of the baggage car for passengers, nor was the fact of its being a place of danger referred to. Carroll v. New York, etc., R. Co., 1 Duer, 571, was a case decided in the Superior Court of the City of New York, and much relied upon as sustaining the opposite view. There, as here, the plaintiff was injured whilst in the baggage car, and would have escaped if he had been in the passenger car. The court recognized the fact that the baggage car was a place of danger, but held that inasmuch as he was there with the knowledge and consent of the conductor, he was there rightfully, and was entitled to recover. But there was no question made of the violation of such a rule as we have here, nor was even the existence of a similar rule shown. In its absence, it may well be that the assent of the conductor gave him the right to be in the baggage car, and if he was there lawfully, under all the authorities, he was entitled to recover.

Jacobus v. St. Paul etc. R. Co., 20 Minn. 125, 1 Cent. L. J. 125, was also a case of injury to a passenger who was riding in the baggage car, contrary to the rule of the company. The court said there was a conflict of evidence as to whether the plaintiff had been notified of the rule, but that inasmuch as he was shown to have been there with the knowledge and assent of the conductor, it made no difference. The learned judge who delivered the opinion relied upon Railroad Co. v. Chenewith, and the line of cases I have just discussed. Whatever there is of confusion upon this question arises from the misapplication of the rule in Railroad Co. v. Chenewith, and its cognate cases. The difference between a rule for the convenience of the company, and one for the safety of the passenger, has been entirely lost sight of. In the former, the company would be liable, unless the violation was the cause of the accident producing the injury. In the latter, it is sufficient to relieve the company, that the injury was received in consequence of the violation of the rule, and this notwithstanding the fact that the negligence of the company's servants was the cause of the accident. We do not regard Jacobus v. Railroad Co., as entitled to weight as authority. The reasoning of the court is not satisfactory, and the authorities cited do not sustain the position assumed by the learned judge who delivered the opinion.

I am not aware that it has been decided in any well considered case that a passenger may, as a matter of right, ride in the baggage car at the risk of the company. In a few cases it has been held that the assent of the conductor is sufficient to charge the latter with the consequences of his act; that it amounts to a waiver of the rule forbidding passengers to ride in the baggage car. But how can a conductor waive a rule which by its very terms he is commanded to enforce? He may neglect to enforce it, and when the rule is a mere police arrangement of the company, such neglect might perhaps amount to a waiver as between the passenger and the company. But where the rule is for the protection of human life, the case is very different. We are not disposed to encourage conductors or other railroad officials in violating reasonable rules, which are essential to the traveling public. If it is once understood that a man who rides in a baggage car, in violation of the rules, does so at his own risk, we shall have fewer accidents of this description.

On the other side, we have the case of Robertson v. Erie R. Co., 22 Barb. 91, in which it was held that where one rode upon the engine in violation of the known rules of the company, and was there injured, he could not recover, notwithstanding he was there with the assent of the engineer; and our own case of Pittsburgh etc. R. Co. v. McClurg, 56 Pa. St. 294, in which it was held that where a traveller "puts his elbow or his arm out of a car-window voluntarily, without any qualifying circumstances impelling him to do it, it is negligence *in se*;" and where that is the state of the evidence, it is the duty of the court to declare the act negligence in law."

The plaintiffs must be held to a knowledge by Langdon, the deceased, of the rule in question. Aside from the fact that it was conspicuously posted in the baggage-car, it is not disputed that the deceased was an employee of the defendant company. That he was temporarily out of work, as was alleged, by reason of the burning of the depot, is not material. Whilst all his rights as a passenger are conceded, his position was such that he must have been familiar with a rule that is generally known to every intelligent man who travels by rail.

We need not pursue the subject further. We regard the weight of authority as with the principle indicated, and it is sustained by the sounder reason.

Judgment reversed.

ABSTRACTS OF RECENT DECISIONS

ENGLISH, IRISH AND CANADIAN CASES.

AUCTIONEER — LIABILITY FOR VALUE OF GOODS RECEIVED FOR SALE — NOTICE OF CLAIM—INQUIRY AS TO VALUE.—1. An auctioneer has not merely the custody of goods intrusted to him for sale, but also an interest in and possession of them, whether the sale be on the premises of the owner or in public auction room. 2. An auctioneer having been requested by A to sell certain goods, agreed to do so at a warehouse where they were stored by A. The day before the sale he received notice that B claimed the goods, notwithstanding which he put them up for sale and returned to A those not sold. B having proved her right to the goods: *Held*, that the auctioneer was liable for the value of the goods returned to A, as well as of those sold. Williams v. Millington, 1 H. Bl. 81, followed.

—*Davis v. Artingstall.* English High Court, Chy. Div. 42 L. T. (N. S.) 507.

SALE BY AUCTION — CONDITIONS —WARRANTY—ACTION FOR BREACH OF—LIMITED RIGHT OF QUESTIONING.—Where, at a sale by auction of a horse warranted a good worker, one of the conditions of sale was that any horse not answering a warranty must be returned by five o'clock on the day after the sale, to be tried by a competent person appointed by the proprietors of the repository where the sale took place, whose decision should be final. *Held*, that no action could, in the absence of fraud, be brought by the purchaser for breach of warranty, the horse not having been returned on the day after sale.—*Hinchcliffe v. Barwick*, English Court of Appeal, 42 L. T. (N. S.) 492.

CUSTOM— CAN NOT OVERRIDE EXPRESS AGREEMENT.—The defendant chartered a vessel from the plaintiff for a particular voyage. In the charter-party it was agreed that after loading, the vessel should proceed to a safe port in the United Kingdom or on the Continent between Havre and Hamburg, both ports included, as ordered, or "so near thereto as she could safely get," and deliver the cargo on being paid freight. The vessel on being ordered for Hamburg sailed for that port, but on account of her draught of water she could not get nearer to Hamburg than Stade, at which place the plaintiff offered to deliver the cargo or so much of it as would lighten the ship and enable her to proceed. The defendant refused to accept any of the cargo at Stade; and in order to earn the freight the plaintiff discharged part of the cargo into lighters, in which it was conveyed to Hamburg, and there delivered to the defendant's agent. The vessel being thus lightened arrived at Hamburg and delivered the remainder of the cargo. The action was for breach of the charter-party in refusing to accept any of the cargo at Stade, and the plaintiff claimed as damages the expense incurred by him for lighterage from Stade to Hamburg. The defendant pleaded a custom of the port of Hamburg, by which he was not bound to accept at any place but Hamburg. On demurrer to this plea: *Held*, that the custom of Hamburg could not override the express agreement in the charter-party, and that the plaintiff was entitled to the lighterage expenses. Judgment of GROVE, J. (reported 28 W. R. 138), affirmed.—*Hayton v. Irwin.* English Court of Appeal, 28 W. R. 665.

INDECENT ASSAULT—CONSENT — CHILD OF TENDER YEARS.—The prisoner was indicted for assaulting one Sarah Binton, a child of seven years of age. It appeared that the mother of the child noticing that she had a discharge from her private parts, took her to a surgeon for advice, who treated the case as one of gonorrhœa. In consequence of this, inquiries were made, and the child stated at the trial that she and another child of like age had been accustomed to ride with the prisoner in his milk cart, and that on one occasion she and the prisoner got out of the cart and went into a yard; that there the prisoner undid his trousers and lifted up her clothes, putting his private parts against her own. The prisoner on being examined by a surgeon was found to be diseased, and in such a state that contact with his person might have infected the child in the manner described by the surgeon. There was no sign of penetration or of violence. The prisoner was defended by counsel, who proposed to address the jury on the question of the child's consent to the prisoner's act. The court refused to allow the question of consent to be put to the jury, ruling that a child of seven years old might submit, but is incapable of giving consent in such a case. The prisoner was convicted. *Held*, that the ruling of the court was improper, and that the conviction must be quashed. Reg. v. Read, 1 Den. C. C. 377; 3 Cox, C. C. 266.—*Reg v. Roadley.* English High Court, Crown Cases Reserved. 45 L. T. (N. S.) 515.

SUPREME COURT OF GEORGIA.

June Term, 1880.

SALE—DELIVERY TO CARRIER—MISTAKE IN PRICE AFTERWARDS DISCOVERED.—1. If plaintiff stated the price of his goods to defendants, who ordered at that price, and the plaintiff delivered them to a common carrier consigned to the defendants, that was such a delivery to them as to make the sale complete at the price named. 2. If plaintiff afterwards notified defendants that there was a mistake in the price, and not to use the goods except at a higher price, this would not change in any way the rights of the parties, although they may have been used, unless the defendants assumed to pay the additional amount claimed. Judgment affirmed.—*Star Glass Co. v. Longley.*

MASTER AND SERVANT—ACTION FOR WRONGFUL DISCHARGE—EVIDENCE.—1. In a suit by one as a discharged employee, the issue being whether or not he was discharged, statements made by him after the time when notice of the discharge was alleged to have been given, and before the time when it was to take effect, were admissible to show a preference by him for other service. 2. H sued C, B & Co., as a discharged employee; one plea was that he had accepted employment with A, and had not been injured. It appeared that plaintiff traveled for A, and sold fruit trees, taking notes therefor; he was to get a commission on what was collected from these sales. Books containing notes were offered in evidence on the testimony of A, that they had been received from plaintiff; also a book compiled from these notes by A and plaintiff containing a schedule of the makers and amounts, where marks of payments were made: *Held*, that they were admissible. 3. It being admitted that the plaintiff was employed by defendants for a year, and that the employment terminated before the end of the year, the issue being whether the termination was by discharge or rescission, evidence was not admissible to show that plaintiff left a more lucrative situation in order to obtain a year's employment with defendants. Judgment affirmed.—*Howard v. Chamberlain.*

RAILROAD— EMPLOYEE— CONTRIBUTORY NEGLIGENCE — MEASURE OF DAMAGES — EVIDENCE.—1. In a suit by a widow against a railroad company for the homicide of her husband, who was an engineer in its employment, two things are necessary to a recovery: First, absence of negligence on his part contributing to the occasion or cause of his death; and, second, negligence on the part of the company or some other agent or employee. When it is shown that the deceased was without fault the presumption of negligence on the part of the road arises. It may however be rebutted by proof. If neither the company nor the employees were negligent there can be no recovery. 2. An engineer having jumped from his engine and been killed, and the question being whether or not he was without fault, the necessity for jumping, his ability to jump, and the safety with which he could do so, are all for the consideration of the jury, and it was error for the judge to charge that "the fact that he jumped is proof that he thought jumping was the safest course." 3. The court charged as follows: "The pecuniary damages

to the wife from the homicide are to be ascertained by inquiring what would be a reasonable support, according to the circumstances in life of the husband as they existed at his death, and as they may be reasonably expected to exist in view of his character, habits, occupation and prospects in life; and when the annual money value of that support has been found, to give as damages, its present worth, according to the expectation of the life of the deceased, as ascertained by the mortuary tables of well-established reputation." *Held*, that under the facts of the case, the court should have amplified this charge, and the attention of the jury should have been called to the declining years of the deceased, and the probable decrease year by year of his capacity to labor. 4. In a suit by the wife of an engineer against a railroad company for his homicide, the jury should consider the age of the deceased, and if old, his consequent incapacity to labor long. Reversed.—*Central R. Co. v. Roach.*

SUPREME COURT OF MICHIGAN.

June, 1880.

GAS COMAANY—ORDINANCE FORBIDDING CONSOLIDATION—BREACH—PENALTY.—The City of Detroit authorized the Mutual Gas Light Company to lay gas pipes in the city, construct gas works and sell gas, etc., the ordinance providing among other things as follows: "And the said corporation is hereby expressly forbidden to sell its property, franchises or privileges to any other gas light company, under a penalty of a forfeiture to this city of its works, mains and other property; and an acceptance of this ordinance shall be deemed a consent by said corporation that the title of said property shall vest in the city at once in case of such sale." *Held:* 1. That an agreement entered into between said company and the Detroit Gas Company dividing the city between them was a violation of the ordinance. 2. The violation of such an agreement would not be a forfeiture of the consent given by the city, nor of the property of the corporation acquired thereunder. This would be a measure of damages for the violation of an agreement recognized neither in courts of law nor of chancery. Affirmed. Opinion by MARSTON, J.—*City of Detroit v. Mutual Gas Co.*

FIRE INSURANCE—POLICY ON PERSONALTY AND REALTY—FALSE REPRESENTATIONS NOT SEVERABLE.—Insurance was taken out on a building, and also on personal property contained therein. False representations in regard to the title to the building were made. The rate of premium was the same for the whole. *Held*, that the claims were not divisible, and that the insurance was void both as to the personal property and the building. That the company would have taken a risk upon the personal property alone, to a like amount and at the same rate, we may assume, even with full knowledge that the insured had no title to the building; but it would be hazardous to assume that with such knowledge, the company would have written upon both the personal property and the building, so that upon the whole policy the insured would be more interested in a loss of both, than in their protection. It was declared in this policy that the omission to make known a material fact should render it void, and we can not say that the false representation was not material as to both the real and personal property. The case should be clear and free from all reasonable doubt, to warrant a court in carving out separate and distinct contracts from one common whole. Reversed. Opinion by MARSTON, C. J. —*Ætna Ins. Co. v. Resh.*

OFFICIAL BONDS—MISTAKE IN OBLIGEE—JUDGMENT OF QUASI OFFICIAL BOARD.—The statute of Michigan (Comp. L. § 551) requires the bonds of sheriffs to be given to "the People of the State." By another statute such bonds are required to be approved by the Board of Supervisors. In an action against the sureties on the bond of B, a sheriff, it appeared that by mistake it had been entered into and approved by the supervisors to the use of the "County of Bay" instead of the "People of the State." *Held*, that the bond was nevertheless valid. The taking of the bond is by the Board of Supervisors, and the approval of the form and security is confined wholly to that body. If they decide to take one, the form of which is not what it should be, and it is invalid in consequence, there is and can be no redress whatever for those who may be injured. The duties of the board are *quasi* judicial, and no action can be predicted upon an erroneous performance. Van Deusen v. Newcomer, 40 Mich. 90, 135; Raynsford v. Phelps, 10 Cent. L. J. 464. In this case this *quasi* judicial board has decided that it is proper to name the county as obligee. While the statute ought to have been obeyed literally, yet in so far as it names the nominal obligee in the bond, it is to be regarded as a directory provision merely. The obligee is not named because of any interest in the condition, but merely that there may be a promissee and a party in whose name to bring suit. Nothing of importance depends upon its being the State rather than the county. The condition is the important requirement, and the naming of an obligee is the merest formality possible, so that if the instrument omitted to name one, as the statute evidently contemplates shall be done in the case of a constable (Comp. Laws, § 723), the substance of the undertaking would still remain. The approval of the supervisors in the case of a sheriff's bond, in which all the substantial requirements appear, is conclusive. Reversed. Opinion by COOLEY, J., GRAVES, J., dissenting.— *Bay County v. Brock.*

SUPREME COURT OF MISSISSIPPI.

April Term, 1880.

OFFICES AND OFFICERS—DISQUALIFICATION FOR NOT PAYING OVER MONEY.—The Constitution (art. VI. sec. 16) provides that no person liable for public moneys unaccounted for shall be eligible to a seat in either house of the legislature, or to any office of profit or trust, until he shall have accounted for and paid over all sums for which he may have been liable. B was elected sheriff of H County, but it appears that some years before, B, as deputy of L, the then sheriff, and under a special contract with him, collected $2,100 license taxes, which he failed to pay over and for which he is still indebted. *Held*, that the above section of the Constitution is not confined in its terms to public officers, though doubtless intended primarily to apply to them. It embraces, both in letter and spirit, all who have in any manner become recipients and holders of any portion of the public revenue. B is ineligible, not because he was a deputy of L, or a surety upon his official bond, but because it is admitted that he himself collected and still retains a portion of the public moneys. The fact that the State may ignore the private contract between himself and L, and hold the latter and his sureties liable, does not acquit B of the liability resting upon him by virtue of the fact that he actually has the money. It is sim-

ply a case of the liability of two persons in which a judgment may be had against both, to be satisfied and discharged by a payment by either. Reversed. Opinion by CHALMERS, J.—*Hoskins v. Baker.*

MUNICIPAL BONDS—POWER TO ISSUE—BONA FIDE HOLDER.—An act of the Legislature authorized the issue of bonds by the Town of O, and provided that they should be made payable at a time "not to extend beyond ten years from the date of issuance." The bonds were issued, but made payable twenty years from the date of their issuance. *Held*, that they were void for want of authority to issue them. Any person dealing in such bonds is bound to look to the public statute of the State which confers power to issue them, and is chargeable with notice of any want of power to issue the very bonds issued, notwithstanding they recite on their face that they were issued in conformity to the statute. As to matters of fact, constituting the conditions for the exercise of power conferred to issue bonds, purchasers might rely on the recitals of the bonds, but as to the terms of the act conferring the power, they were bound to look to the act itself, and not to any misrepresentation or misinterpretation of it contained in the recitals of the bonds. They are to be read as if the act authorizing their issuance was embodied in them, and any material variance from the act makes them void. Judgment affirmed. Opinion by CAMPBELL, J.—*Woodruff v. Town of Okolona.*

WITNESSES—HUSBAND AND WIFE—DIVORCE.—1. The original incompetency of parties occupying the marital relation as witnesses for and against each other, as it existed at the common law, exists now, except when it has been clearly and plainly reversed by statute. 2. In Byrd v. State, 10 Cent. L. J. 335, the prior cases in this court were reviewed, and the conclusion reached that the wife could be examined as a witness against the husband only in criminal proceedings against him for personal injuries inflicted upon her. This was the extent of her competency against the husband at common law. 3. A proceeding for divorce is a civil, not a criminal suit, and is directed "to be conducted as other suits in chancery." Code, § 1773. No authority has been cited to show that the above rule of the common law which admits the wife as a competent witness against the husband has been extended to suits for divorce, to the extent of allowing her to prove acts of personal violence on the part of the husband. Reversed. Opinion by GEORGE, C. J.—*Johnson v. Johnson.*

RAPE—REQUISITES OF INDICTMENT "FELONIOUSLY."—Prisoner was convicted of rape, but it is insisted that the indictment is insufficient, because the ravishment was not charged to have been done feloniously. It charges that the prisoner "with force and arms, in and upon one Niley Edwards, a female over the age of ten years, there being, violently and feloniously did make an assault, and her, the said Niley Edwards, then and there forcibly and against her will did then and there ravish and carnally know against the peace," etc. *Held*, that the objection that the word "feloniously" should have been repeated in connection with "ravish" was well taken. Reversed. Opinion by GEORGE, C. J.—*Hays v. State.*

SUPREME COURT OF OHIO.

June-July, 1880.

NEGLIGENCE—IMPUTED NEGLIGENCE.—In an action by a railroad passenger (who was, in fact, without fault himself), for a personal injury, against a defendant whose negligence directly and proximately concurred with the negligence of the railroad company in producing the injury, the concurrent negligence of the company can not be imputed to the plaintiff so as to charge him with contributing to his own injury. Judgment affirmed. Opinion by MCILVAINE, J.—*Covington Transfer Co. v. Kelley.*

SLANDER — WHAT WORDS IMPUTE WANT OF CHASTITY—EVIDENCE—VARIANCE.—1. Words charging a woman with sleeping with a man, not her husband, impute to her a want of chastity, and therefore are actionable *per se*. 2. The fact that a woman bears a different name from a person with whom she is charged to have been intimate, tends to prove that she is not the latter's wife. 3. The defendant in an action of slander was charged with saying of the plaintiff that she slept with a man not her husband. The proof showed the statement to be that such person was in bed with her. *Held*, that the want of correspondence between the allegation and proof raises a mere question of variance, and is not a failure of proof, within the meaning of section 133 of the code of civil procedure. Judgment affirmed. Opinion by BOYNTON, J.—*Barnett v. Ward.*

ATTACHMENT—JUDGMENTS—GENERAL EXECUTIONS—PRIORITY—WAIVER.—April 3, A, B and C commenced actions and sued out attachments, which were on the same day served by seizure of a stock of goods of the defendant. April 5, 6, 14 and 20 other creditors also issued attachments, which were delivered to the same officer, at their respective dates, and levied on the goods in his custody under the prior writs, each of said levies being made subject to prior levies. May 3, A, B and C obtained judgments, and on the same day issued general executions instead of orders of sale of the attached property, under which a sale was made of the same May 20, and the money brought into court. June 15 the other creditors also obtained judgments and orders of sale, and while a motion of A, B and C was pending to award to them the money, which was not sufficient to pay all, on the ground of their prior attachments, the other creditors issued orders of sale thereon: *Held* that the issuing of a general execution, instead of an order for the sale of the attached property, and a sale of said property thereon, were not of themselves a waiver or abandonment of the priority acquired by the attachment, and that the money arising from such sale should be distributed according to such priority. Judgment affirmed. Opinion by JOHNSON J.—*Liebman v. Ashbacker.*

RAILROAD COMPANY—DRAINS—DAMAGES.—A railway company, in consideration of the grant of a right of way for its road, through the lands of the plaintiff and of two other adjoining proprietors, agreed to make such culverts and crossings as might be necessary to enable the parties "to reasonably occupy their lands, to carry off surplus water, etc." and that upon the hillside of said road a sufficient drain should be made and kept open "for the discharge of the drainage." The company built a culvert across its road south of and below said lands, with which the drain on the hillside of the road was connected, and through which the drainage from the lands of the plaintiff was discharged. *Held*, that the culverts and the drain form necessary parts of the plan or means agreed on for draining the lands of the plaintiff on the hillside of the railroad, and that for damages caused to such lands by the obstruction of the drain, the company is liable, although the obstruction may not have been on the lands of either of the parties granting the right of way. Judgment reversed and cause remanded for a new trial. Opinion by WHITE, J.—*Madden v. Cincinnati etc. R. Co.*

SUPREME COURT OF INDIANA.

May Term, 1880.

CRIMINAL LAW—DEFENDANT'S RIGHT TO BILL OF EXCEPTIONS.—In this case the petitioner had been found guilty of murder by a jury, with the sentence of death therefor, and his counsel made a motion for a new trial. When the motion came up for argument, it was shown to the court that the petitioner had escaped, and was at large. The court upon this showing overruled the motion for a new trial, and refused to permit petitioner's counsel to enter an exception to his ruling. Afterwards, at the same term of court, counsel presented and offered to file a general bill of exceptions, which the court pronounced correct, but refused to sign it, and to allow it to be made a part of the record of the case. Within a few days thereafter the petitioner was recaptured, and is now in jail under sentence of death. The petitioner then prayed the Supreme Court for a writ of mandate, requiring the judge of the court below to allow his exception to the ruling of the court overruling his motion for a new trial, and requiring him to sign and seal his bill of exceptions as a part of the record of the case. BIDDLE, C. J., granted the writ of mandate as prayed. —*Monyhan v. State.*

GUARANTY—RIGHT OF GUARANTOR TO NOTICE OF ACCEPTANCE—ALTERATION.—Suit upon the following guaranty: "$600. I hereby guarantee the payment of $600 to Raymond, Lowe & Co., Cleveland, Ohio, for goods bought April 3, 1872, by G. H Baxter, Muncie, Ind.; the terms being, for net goods sixty days and time goods four months. This guaranty shall cover any balance in account not exceeding the amount named. Invoice not made out and may exceed the amount guaranteed by $200 or $300." Signed by appellant. In considering the question of a guarantor's right to notice of the acceptance of his guaranty, a distinction must be observed between a mere offer to guaranty and an actual guaranty. When the guaranty is made only as an offer or proposition, there must be notice of the acceptance of it; but where the undertaking is absolute, notice is unnecessary. 2 Story on Con. sec. 1133; 2 Par. Con. 12, sec. 4; 1 Id. 479; 64 Ind. 356; 67 Ind. 55. The guaranty sued on in this case was an absolute one, requiring no notice either of its acceptance or of the default of the debtor. *Held*, that the answer, which alleged that the guarantor signed the instrument in consideration of an agreement between himself and the debtor that certain other persons were also to sign it, but not averring that the plaintiff, the guarantee, had notice, either actual or constructive, of such agreement, was not sufficient, as not showing that the agreement was binding on the plaintiff. 24 Ind. 481; 32 Ind. 313. *Held*, also, that an alteration made in the guaranty after its delivery to the debtor, by changing the reading from "we hereby guaranty," to "I hereby guaranty," was immaterial, as such guaranty, when signed by one guarantor, is his several obligation whether it begins with "we" or "I." 30 Ind. 317; 5 Blackf. 584. Affirmed. Opinion by NIBLACK, J.—*Kline v. Raymond.*

SUPREME COURT OF IOWA.

June, 1880.

CRIMINAL LAW—MALICIOUSLY KILLING DOMESTIC BEAST—MALICE.—1. The prisoner was convicted under sec. 3977 of the Code, which provides that if any person maliciously kills the domestic beast of another, he shall be punished as therein stated. The court instructed the jury that, "in order to find the defendants guilty, they must first find from the evidence not only that they shot the horse, but must also find the further fact, that the shooting was done maliciously, that it was done with the intent and for the purpose of injuring some person." *Held*, that this instruction was not erroneous, because the jury were not directed that malice against the owner was an essential ingredient of the offense. Such language, in substance, was used by Baldwin, J., in State v. Harris, 11 Iowa, 415, but no such point was before the court in that case. We, therefore, are not bound thereby. The statute in terms does not require that the perpetrator should be actuated because of malice to the owner. Mere wantonness, or an intent simply to injure the animal without malice against any person, it may be conceded is not sufficient. But, although the owner may be unknown, if the act is done maliciously, for the purpose and with the intent of injuring such person, it is sufficient. Such, we think, is the meaning and intent of the statute, and we are not disposed to draw nice distinctions, the effect of which would be to screen offenders from deserved punishment. 2. The court further instructed the jury that they might "infer malice from the acts of the defendants." This instruction is also correct. In McCord v. High, 24 Iowa, 337, it is said: "There is no clearer rule of evidence than that malice may be inferred from the acts of a party." Affirmed. Opinion by SEEVERS, J.—*State v. Linde.*

NATURALIZATION—ALIENS—WHO ARE NOT.—In these cases after verdicts for larceny against the defendants they moved for arrest of judgment, upon the alleged ground that two of the grand jurors were not citizens of the State of Iowa, nor of the United States, and were not qualified to act as grand jurors. One of the grand jurors, upon examination, stated that he was born in Canada; that his father was born in the State of Vermont, and was a revolutionary soldier, and drew a pension while he lived in Canada; that the grand juror lived with his father in Canada until he was sixteen years of age, when he removed to the United States. Thereupon the defendants challenged the grand juror, but the challenge was disallowed, and the defendants excepted. Another grand juror, upon examination, stated that he was born in Ireland; that he came to America when he was twelve years of age, and that when he was eighteen or nineteen years of age, his father took out letters of naturalization in the City of New York. Thereupon the defendants challenged the grand juror, but the challenge was disallowed and the defendants excepted. *Held*, that the challenges were properly overruled. Affirmed. Opinion by ADAMS, C. J.—*State v. Haynes*; *State v Roy.*

QUERIES AND ANSWERS.

[*** *The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*]

QUERIES.

6. A conveys land to B, who does not record his deed; B conveys to C, who records his deed, but does not go into possession. A afterwards sells and conveys to D, who has no notice, except constructive notice, by reason of its registration, of the conveyance from B to C. Is D affected with notice of the conveyance from A to B?

Hempstead, Texas. T. S. R.

7. A agrees to erect a building suitable for B's occupancy for a particular purpose, and B agrees in the same instrument to occupy and pay rent for a series of years. Possession is afterwards surrendered to B, who accepts a lease from A, in which he, B, covenants that he has received the premises in good condition. A then sells and conveys the premises to C, and assigns the lease to him. Later, by reason of the defective construction of the building, B suffers damage. A for the use of C then sues B for rent under the covenants of the lease. Can B recoup or set off his claim for damages against the claim of A for C's use? C.

Chicago, Ill.

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8. A mortgagor conveys the mortgaged premises, subject to the mortgage. No payment is made by authority of the purchaser, and the statutory limitation has run against the bond and mortgage. Then the mortgagor, who has transferred the equity of redemption, without authority from the purchaser, makes a partial payment on the mortgage. Is such partial payment sufficient to revive the mortgage lien as against the purchaser of the premises mortgaged? D. L. A.

Sherburne, N. Y.

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9. A makes his will, and bequeaths to B the income of $2,000 in these words, i. e., "I bequeath to B the income of $2,000, which shall be made equal to $120 per annum." After A's decease, B is paid $120 a year for ten years, when it is discovered by the other legal heirs of A, that there is a surplus accumulated from the income of this invested $2,000, beyond $120 per annum. So the other legal heirs of A demand this surplus of the trustee of the $2,000. To whom does this surplus belong? To the other legal heirs of A, or to B? E. S. W.

Sandwich, Mass.

ANSWERS.

45. [10 Cent. L. J. 477.) The debt of the corporation was contracted at the time the first note was given, and the limitation created by the charter began to run in favor of the stockholder at that time. A suspension of the remedy of the creditor by the taking of renewal notes did not suspend the running of the bar so far as the stockholder was concerned, unless (if at all) he consented to the extension. "A suspension of the remedy against the corporation does not extinguish the debt, and therefore the liability of the stockholder is unaffected." Young v. Rosenbaum, 39 Cal. 646; Bassett v. St. Albans Hotel Co., 47 Vt. 313; Conklin v. Furman, 57 Barb. 484; s. c. 48 N. Y. 527; Carroll v. Green, 92 U. S. 509; Thompson's Liability of Stockholders, §§ 34, 96. J.

Chicago, Ill.

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5. [11 Cent. L. J. 18.] B can not recover of C the balance due on the mortgage debt. C assumes no personal responsibility, but merely takes the land subject to the mortgage. Lee v. Newman, 55 Miss, 369; Second Nat. Bank v. Grand Lodge, 8 Cent. L. J. 71.

J. D. GILLAND.

Vicksburg, Miss.

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2. [11 Cent. L. J. 18.] In no case save that of a public prosecution for a felonious homicide can dying declarations of the deceased party be received in evidence. In civil cases they are not admissible. This is the doctrine both in this country and England. The leading cases in this country against their admissibility in civil cases are Wilson v. Boerem, 15 Johns. 286; Marshall v. Chicago etc. R. Co., 48 Ill. 475. The Illinois statute which allows an action in favor of the representative of a deceased party for damages is similar to the Texas statute. The only case holding a contrary doctrine is McFarland v. Shaw, 2 N. C. (Law) 102. This was a case for seduction brought by the father, and he was permitted to give in evidence the dying declarations of his daughter, that the defendant was her seducer. FRANK ROYSE.

Atchison, Kas.

Jas. W. Riggs, Winchester, Ill., cites the following cases as holding such declarations inadmissible: Jackson v. Kniffen, 2 Johns. 35; Gray v. Goodrich, 7 Johns. 95; Kent v. Walton, 7 Wend. 256; Daily v. New York etc. R. Co., 32 Conn. 356.

CURRENT TOPICS.

With the din of pyrotechnics still in our ears and the Fourth of July of this year only one day old, the case of *Daingerfield v. Thompson*, decided by the Supreme Court of Appeals of Virginia at its last term, attracts our notice as likely to be cited in future cases in which the patriotic American citizen shall be a defendant. The plaintiff, Thompson, was the keeper of a restaurant and about 11 P. M., after he had closed for the night, hearing a noise outside, was on the point of opening the door, when he was shot through the right foot with a pistol ball which had penetrated the door from the outside. It appeared that several persons being on the street waiting for the plaintiff to let them in, the defendant said to one of them who had a pistol, "Let us give him a salute." To which the latter, one Harrison, replied, "I'll do it," and immediately fired. When the parties entered the restaurant and found how the "salute" had resulted. Harrison was greatly alarmed and said to the defendant: "This would not have happened if you hadn't told me to fire a salute." To which defendant answered: "I didn't suppose you were d—d fool enough to fire into the house—I thought you'd fire into the air." There was an ordinance of the city prohibiting the discharge of fire-arms in the streets. As it appeared that Harrison, the principal in the affair, was "not worth anything," Thompson brought suit against the defendant for the injury and recovered a judgment for $8000, which on appeal was affirmed. The judgment of Christian, J., who delivered the opinion of the court, is given below.

"The wilful firing of a pistol in the streets of a city, whether maliciously or not," said Christian, J., "is of itself an unlawful act, and the consequence of such unlawful act must be visited upon those who commit it or instigate it. Safety and protection to society require that both the actors and instigators of unlawful acts should be held to strict accountability for the consequences of their violation of law. It is no excuse or justification of Daingerfield to say that he did not fire the pistol which caused the injury. He was the aider and abettor and instigator of Harrison, who fired the fatal shot, and who himself admits that it was fired at his advice and instigation. And it is no excuse or justification to say that he simply told him to fire a salute, and that he expected him (Harrison) to fire in the air. The firing of the pistol was in itself an unlawful act, and advised and instigated by him, he must take the consequences of the result. He who commands or procures another to do an unlawful act, is as responsible as a trespasser as he who commits the trespass. Jordan v. Wyatt, 4 Gratt. 156. And although the act committed was done without malice, yet being unlawful, the party committing it or aiding or abetting in its commission, is responsible in damages to the party injured. Parsons v. Harper, 16 Gratt. 64. It is earnestly insisted, however, by the learned counsel for the plaintiff in error (Daingerfield), that the evidence against him does not sustain the charge in the declaration, and in each count thereof, of assault and battery; that while such assault is proved against Harrison, who fired the pistol, it is not proved as to Daingerfield; that he committed no assault, but simply advised and instigated an act which was in itself harmless, to wit: 'Fire a salute;' and that this act was not a trespass or assault as far as Daingerfield was concerned; that he did not direct Harrison to shoot Thompson, or to fire into his house, but simply to "fire a salute," and that Harrison did another and different act from the one which was ad-

vised and instigated by Daingerfield, and that the injury resulted from Harrison's act done differently from the act directed by Daingerfield, and consequently Daingerfield can not be held liable in this action. Now, the fatal defect in this argument is that the firing of a pistol in the streets of a city is not a harmless act, but on the contrary is an unlawful and dangerous act, prohibited and made unlawful by express ordinance. And besides, the evidence abundantly shows that even before the firing of the pistol. Daingerfield and Harrison were joint trespassers upon the premises of Thompson. The firing of the pistol was an aggravation of the trespass, and being in itself an unlawful act (and that unlawful act causing the fatal injury), being instigated and prompted by Daingerfield, he is equally responsible with Harrison for its unhappy consequences, although it was not done maliciously and not done by the hand of Daingerfield. The law is well settled that any person who is present at the commission of a trespass, encouraging or inciting the same by words, gestures, looks or signs, or who in any way or by any means, countenances or approves the same, is in law deemed to be an aider and abettor, and liable as principal. 1 Hale, P. C. 438; 3 Greenlf., §§ 40, 41; 43 Mo. 206, and cases there cited. There seems, indeed, to be no principle of law better settled, and for which numerous authorities may be cited if necessary, than this—that all persons who wrongfully contribute in any manner to the commission of a trespass are responsible as principals, and each one is liable to the extent of the injury done. The defendant, Daingerfield, being present, aiding and abetting and instigating Harrison, was equally guilty with him of an assault to the same degree as if he had fired the fatal shot himself."

The large number of disasters on our waters which have occurred during the present summer, direct attention to the law of negligence and the responsibility of the owners of steamships and other craft, for injury to the persons and property of passengers. Travel by rail seems to be much safer than by water, but whether this be the result of the greater responsibility under which carriers by land carry on their business, can not, perhaps, be determined. The wisdom of Congress in exempting carriers by water from their original liability as insurers may well be doubted, even though it has substituted a code of regulations, which, if followed, would seem to make safety doubly sure. Noticing the law on this subject, the New York *Daily Register* says: "The omnibus proceedings under the limited liability act of Congress, and the opposite redress sought in the State Courts of Massachusetts, in the Narragansett case, will probably constitute a *cause celebre* which will, it is to be hoped, define more clearly the liabilities of recklessness and indifference to the necessary precautions for human life. The limited liability act is a sort of aggressive defense by which the owners whose vessel causes a disaster can proceed against all the sufferers, and instead of having a jury assess the damages which each victim ought to receive, have them assess the aggregate loss it is thought the unfortunate owners ought to be cast in, and then allot this among the sufferers. This is a sort of bankruptcy discharge for tort feasors. Whether it is just or grossly unjust must perhaps depend on how it is administered. The proceedings on both sides will be watched with interest by the public as well as by the profession."

RECENT LEGAL LITERATURE.

ANSON ON CONTRACT.

This is a presentation in brief and summary form of the principles underlying the law of contract. Though intended for the use, principally, of students, a glance at the plan of analysis adopted will show that it will be of use to all practitioners who have not yet analyzed the subject of contract to their own satisfaction. The principal divisions of the subject after defining the Place of Contract in Jurisprudence, treat respectively of the Formation, Operation, Interpretation and Discharge of Contract. Glancing here at only the second subject, the Formation of Contract, we find the topics into which it is subdivided are as follows: 1. Proposal and Acceptance. 2. Form and Consideration. 3. Capacity of Parties. 4. Reality of Consent. 5. Legality of Object.

This will suffice to show the clearness and general accuracy of Sir William Anson's analysis. For more particular understanding of his system, we can refer to only one chapter—that which treats of Genuineness or Reality of Consent. Under this novel but apt title, are grouped statements of the principles applicable under the five heads of Mistake, Misrepresentation, Fraud, Duress and Undue Influence. We think such an analysis as this speaks for itself, and will prove additionally the value of such a dissection by students of the anatomy of the science as will enable them to understand and comprehend thoroughly "the ribs of the law." Following this severe analysis, the author has given his statements of the doctrines of this branch of the law in 338 pages. The style in which they are expressed is commendably clear and plain. We would like to give in full his definitions of mistake and the other defects which impeach the genuineness of consent; but we can afford space only to quote his definitions of Contract, which he draws principally from Savigny. "Contract is a combination of the two ideas of agreement and obligation." "Agreement is the expression by two or more persons of a common intention to affect the legal relations of those persons." "Obligation is that special right and duty which create a *vinculum juris* between two persons or groups of persons." Therefore, "Contract is an agreement enforceable at law, made between two or more persons, by which rights are acquired by one or both to acts or forbearances on the part of the other."

With so simple an enunciation of fundamental principles, Mr. Anson has wisely limited his citations of authorities to only one or two upon any point, which he properly deems sufficient for both student and practitioner. Mr. Aldrich in this reprint has followed a similar general rule as to the American authorities, indulging in extended citations only where they were rendered necessary by the conflicts and variances so frequent among the courts of the several States. It has seemed to us that Mr. Aldrich's notes are too few and too scanty. He has added but sixteen pages to the English text. We wish he had given the student at least one citation of an undisputed American authority in support of each proposition of the text, instead of allowing him to rest unconcernedly on the doctrine as dogmatically stated by Mr. Anson. It was the latter's idea to send the student, on each proposition, to some one well-considered English case; and the same plan might

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Principles of the Law of Contract. By Sir William R. Anson, Bart., of the Inner Temple. Edited and annotated with American notes by O. W. Aldrich, Professor of Law in Illinois Wesleyan University. Chicago: Callaghan & Co. 1880.

have been well followed as to the American cases, in this reprint. But we must not refrain from noticing the American editor's independence of thought and investigation and comment. In several instances, we find him doubting the pertinence of the authority cited by the author. One of these is found at page sixteen, where the case of Xenos v. Wickham, L. R. 2 H. L. 296, is cited under the subject of Proposal and Acceptance, as holding that assent by the insured at the time of the delivery of a policy was not necessary to the completion of the contract of insurance; a point which Mr. Aldrich thinks was not involved in the case. We understand that case to turn solely on the question of agency, and to hold an insurance broker, while fully authorized to effect a policy, wholly devoid of authority to cancel it.

NOTES.

——That there is history in the law reports every lawyer knows. The author of a late work called "An Old Man's Thoughts about Many Things" proposes an undertaking for some law writer. He says "I propose a great work to some man of ability. He must begin it when he is young, and finish it when he is no longer young. We have a huge and curious body of literature called law reports. They begin very early and they continue now. If a man would take these and all our acts of Parliament, which relate to property, crimes, and all the varied business of life, he might make a history full of instruction and amusement, too. The law reports are the chief matter. There we learn how people lived and what they did a long time ago, and what they have been doing and disputing about up to the present time; their lives and their quarrels, and their frauds and their tricks, their virtues and their vices—but much more of their vices; for law has little to do with men's virtues, and would have very little to do at all if men had no vices. There we learn what learned judges said and did, and how they made law, and then affirmed that it existed before it was made; and how they yielded to power, and how they resisted power; and how one generation after another helped to build up a most enormous, irregular structure, which we keep up because we can not help it. We learn, too, the political and moral notions that prevailed at particular times, and how judges, who are still like other men, were as ignorant and prejudiced as men who were not judges. We find excellent sound sense and the most incomprehensible nonsense all jumbled together; great acuteness in examining into facts, discussing precedents and balancing opposing opinions, and sometimes an ignorance of the simplest principles of law which would have settled at once what these men sometimes settled one way and sometimes another way, till finally, somebody blundered to the right conclusion, which was reached eighteen centuries ago by the Romans, and was only unknown to these judges because they had not learned even the elements of law—judges whose legal knowledge was as empirical as that of a quack doctor, who will prescribe without knowing anything of the structure of the animal that he professes to cure. You will read judgments of men who talked nonsense almost unmixed, and the judgments of men who seldom spake without saying something true. It is the most wonderful, amusing mass of matter that ever a nation piled together. Nobody but a lawyer could handle it, and a lawyer could not handle it if he were totally overpowered by the bonds of his art. For law is a merciless tyrant. It conquers and subdues the strongest heads. A man who has passed his life in the application of positive rules to facts can generally do little else. His interiors are closed; and, like a man long confined in prison, his perception of all that is within his reach is sharpened, but his sense of all that is outside is dulled. He who has been able to resist this power of law is a rare man. My lawyer must be a man of taste and humor, with law enough to understand what he reads, and a little law of his own, which he must get somewhere else than out of reports. He must attempt to show how much of the law that we now have has grown up under judge cultivation, aided by counsel learned in the law and the writers of law books, and the usages of society and current opinions, false and true; for out of all these things a large part of our law has come. He will show, too, how some learned lawyers of past days, who were really learned, derived many of our rules of law from their Roman originals; such rules, for example, as relate to wills and legacies; and how ignorant compilers of a later age make text books out of all these good old books, dropping all reference to the original authorities which they never looked at, and substituting their own ill-digested compilations for sound knowledge and true learning. My lawyer will season his work with particular cases, curious stories and apt remarks, and he will make a history such as we have not yet. When my man is ready for the work, I am ready to tell him how he should go about it."

——In the English Court of Appeal on the 25th inst., James, L. J. gave judgment denying the application of Thos. Castro, the Tichborne claimant, to have the sentences passed upon him for perjury made concurrent.——The New York *Nation* in a review of Hints on Advocacy, speaking of the numberless traps to which an advocate is exposed in cross-examination, relates the following anecdote of Rufus Choate. Of all American lawyers Choate has the reputation of having been the best trier of cases; yet if the story of the answer of the witness who had scuttled the ship is true, he was capable of making serious errors. The suit was on a marine policy of insurance, and Choate represented the plaintiff. The defense was that the vessel had been scuttled. The witness had testified for the defense that he had himself been engaged in the scuttling. In the course of the examination it came out that he had been much urged by the captain to join in the plot, and that the latter had used some convincing argument to which he had yielded. Being pressed to state what this was, he showed great reluctance; but on Choate's insisting that the language should be repeated, he stated that the captain had urged him to join, on the ground that if they were detected, and the worst came to the worst, they must be tried in Boston, and that "Choate would get them off." Choate was here committing a very elementary fault—that of pressing a reluctant witness. ——The *Canada Law Journal* commends to more diffuse courts "the singular succinctness—the comprehensive brevity of the opinions—of Chief Justice Waite of the Supreme Court of the United States. They are models of judicial directness for which the over-worked advocate is thankful in this age of voluminous judgments."——The *Daily Register* calls attention to a somewhat similar instance of brevity in pleading: "The conciseness and clearness of the short complaint of the Erie against McHenry is a model for prolix pleaders. In forty-five words, besides figures or numbers, plaintiff makes all the allegations necessary to recover nearly a million and a half of dollars; and though a bill of particulars might be asked, there is no uncertainty in the short allegation."